Toffoloni v. LFP Publishing Group, LLC Doc. 10 Att. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

MAUREEN TOFFOLONI, as Administrator and Personal Representative of the ESTATE OF NANCY E. BENOIT, Plaintiff, vs. **LFP PUBLISHING GROUP, LLC d/b/a Hustler Magazine, MARK SAMANSKY**, an individual, and other distributors and sellers of Hustler Magazine, as Defendants X, Y, and Z, Defendants.	)	Civil Action No. 1:08-cv-00421-TWT

BRIEF IN SUPPORT OF DEFENDANT LFP PUBLISHING GROUP, LLC'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

This is a lawsuit brought by Maureen Toffoloni, as Administrator of the Estate of her late daughter, Nancy Benoit ("Benoit"), against LFP Publishing Group, LLC ("LFP"), the publisher of the internationally known *Hustler Magazine*, described generally as a "Gentlemen's Magazine." This action revolves around the publication by LFP of a two-page article on the life and death of decedent Benoit in the March, 2008 issue of *Hustler*, including nude photographs of her taken from a video prepared by Defendant Mark Samansky ("Samansky")[1]

Plaintiff initially commenced this action in the Superior Court of Fayette County in the State of Georgia, seeking a temporary restraining order to prevent publication of the subject photographs in the March 2008 issue of *Hustler*, and asserting a single substantive cause of action for violation of the Georgia right of publicity. Defendant LFP removed the case to this Court on the basis of diversity of citizenship, and at a hearing held on February 8, 2008, this Court denied Plaintiff's motion for a temporary restraining order.

Defendant LFP now brings this motion to dismiss the action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, on the grounds that the Complaint herein fails to state a claim for relief.

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[1] Defendant Samansky has filed for bankruptcy in his home district of Colorado and is not a party to the instant motion. Mr. Samansky is not represented by counsel for LFP.

FACTUAL BACKGROUND

As set forth in the Plaintiff's Complaint, the decedent Nancy Benoit, while married to her then-husband, James Daus, posed for nude photographs approximately 20 years ago (Complaint, ¶¶ 9, 13). The photographer and videographer of the subject material was defendant Samansky; Benoit was concededly well aware that he was videotaping the session (Complaint, ¶¶ 10, 11). Thereafter, Benoit allegedly changed her mind about publication of the material, and requested that Samansky destroy same (Complaint, ¶ 13). It is further alleged that Samansky nevertheless kept the videotape of the photographic session, from which he eventually made the subject photographs of Benoit, including photographs depicting her fully or partially nude, which appeared in the March 2008 *Hustler Magazine* (Complaint, ¶ 16).

It is alleged by Plaintiff that subsequent to the photographic session, and until her death in June, 2007, Benoit "had a career as a model, professional woman wrestler and public figure." (Complaint, ¶ 15). As the Court is no doubt aware, Benoit was murdered at her home in Georgia, purportedly by her husband Chris Benoit. The Court may take judicial notice that the murder of Nancy Benoit was a national news story for some time. Chris Benoit was a well-known professional wrestler, Plaintiff herself alleges that Nancy Benoit was a public figure (Complaint, ¶ 15), and the subject of decedent Benoit's death was a national news story, covered by print publications, and by network and cable television news shows.

Defendant Samansky conveyed to Defendant LFP the right to publish the subject photographs of Benoit in *Hustler Magazine* (Complaint, ¶ 17), and LFP published the subject news story and photographs of Benoit in its March, 2008 issue. Due to the nature of the magazine industry,[2] the March, 2008 issue of *Hustler Magazine* was in fact published in early January, 2008. Plaintiff alleges that her counsel wrote to *Hustler Magazine* on January 16, 2008, requesting that *Hustler* refrain from publishing the nude photographs of Benoit (Complaint, ¶ 18; Exhibit C). However, by the time that said letter was sent to Defendant, the March 2008 issue of *Hustler*, including the article and photographs of Benoit, had already been published and sent out for distribution at newsstands, retail outlets, and to its subscribers.

A copy of the subject two-page article and photographs of decedent Benoit (constituting pages 40 and 41 of the March 2008 issue of *Hustler Magazine*) were Exhibit A to the state court Complaint and filed with that court under seal (Complaint, ¶ 8); they were accepted by this Court at the February 8, 2008 hearing as Plaintiff's Exhibit 1 and placed under seal (Hearing Transcript, p.20).

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[2] *Hustler Magazine* is published monthly, plus a Holiday issue, for a total of 13 issues per year. Thus, in a 52-week year, a new issue is necessarily published every four weeks.

Defendant LFP declined to stop publication of its March 2008 issue with the Benoit material, since such publication had already occurred. Defendant also informed counsel for Plaintiff that the photographs of Benoit would be used "to illustrate a legitimate and serious news article . . . about her life." (Complaint, ¶ 19; Exhibit D). Even though Plaintiff was so notified, she nevertheless commenced this action in Georgia Superior Court, seeking a temporary restraining order against publication of photographs that had already been published, and damages for violation of Georgia's posthumous right of publicity as to Nancy Benoit. Defendant LFP removed the action to this Court, and in light of the Plaintiff's failure to demonstrate a likelihood of success on the merits and the mootness of the request for immediate injunctive relief against publication, this Court denied Plaintiff's motion for a temporary restraining order on February 8, 2008 (Hearing Transcript, p.20).

The instant Complaint purports to assert three counts. The first is again for a temporary restraining order against Defendant LFP's publication of the photographs of Benoit, notwithstanding their prior publication in the March 2008 issue of *Hustler Magazine*, and has already been denied. The second purported count is for a permanent injunction against publication of the subject photographs. Again, said photographs were published in the March 2008 issue in early January, 2008; since then, several newer monthly issues of *Hustler* have been published, and said request is again moot.

The final count of Plaintiff's instant Complaint asserts a violation of decedent Benoit's right of publicity, seeking actual and punitive damages, together with attorneys' fees.

Defendant LFP now moves to dismiss this action pursuant to Rule 12(b)(6), for failure to state a claim for relief. Clearly the subject article, involving a conceded public figure about a matter of substantial public interest, is not commercial speech within the meaning of the Georgia right of publicity. Moreover, even if it were, such a claim would be barred as being in violation of the First Amendment to the United States Constitution and a suppression of free speech.

PLAINTIFF'S RIGHT OF PUBLICITY CLAIM AGAINST DEFENDANT LFP SHOULD BE DISMISSED ON THE FACE OF THE PLEADINGS.

As an initial matter, since this is a motion to dismiss on the face of the pleadings pursuant to Rule 12(b)(6), this Court must accept Plaintiff's factual allegations as true, and construe the Complaint in the light most favorable to Plaintiff. Murphy v. Federal Deposit Ins. Co., 208 F.3d 959, 962 (11th Cir. 2000). Nevertheless, even though the Complaint must be construed in favor of Plaintiff, that direction applies only to the facts on which the claim is based. Thus, as stated in Oxford Asset Mgt., Ltd. v. Jaharis, 297 F.3d 1182, 1188 (11th Cir. 2002), "conclusory allegations, unwarranted deductions of fact or legal conclusions masquerading as facts will not prevent dismissal." Moreover, on a motion to dismiss, a Court "need only accept 'well-pleaded facts' and 'reasonable inferences drawn from those facts,'" Gonzalez v. Reno, 325 F.3d 1228, 1235 (11th Cir. 2003), and not legal conclusions masquerading as facts.

The essence of Plaintiff's right of publicity claim is set forth in ¶ 30 of the Complaint, "The Defendants have already published and sold photographs of Nancy Benoit so as to exploit her image for their own commercial purposes." (Complaint ¶ 30). Plaintiff further asserts that LFP's publication of the subject photographs is not authorized pursuant to the freedom of the press, because publication of such nude photographs of Nancy Benoit "are not necessary or relevant to a 'legitimate and serious news article.'" (Complaint, ¶ 20). However, as set forth in the legal standard above, such allegations are not factual in nature, but are conclusory allegations which need not be accepted by this Court.

It is beyond dispute that Defendant LFP published the subject photographs of Benoit in the March 2008 issue of *Hustler Magazine*, as depicted in Exhibit A hereto. Said photographs were taken from a videotape made by Defendant Samansky with the full knowledge of decedent Benoit, rather than being taken surreptitiously without her knowledge (Complaint, ¶ 11). Apparently, Benoit later changed her mind about publishing the photographs or videotape, but Samansky kept the tape and granted rights in photographs of Benoit made from the videotape to LFP, for publication in *Hustler* (Complaint, ¶ 17). However, Plaintiff concedes that until her death in June, 2007, Benoit had a career as a model and professional wrestler, and that she was a public figure (Complaint, ¶ 15). It is undeniable that her untimely death – allegedly at the hands of her husband, former professional wrestler Chris Benoit, who then took his own life – generated great public interest and national news coverage. Thus, the crucial legal question here is whether Plaintiff can state a claim for LFP's violation of Benoit's right of publicity, where without the permission of Benoit or her Estate, LFP published photographs of her in *Hustler Magazine* illustrating her life and death as a matter of public interest, The Georgia Supreme Court was apparently the first American Court to recognize the claim of a right of privacy for advertising purposes, in Pavesich v. New England Life Ins. Co., 122 Ga. 190 (1905). There, the picture of an artist was used without his authorization in a newspaper advertisement for defendant life insurance company. The Court held that publication of a picture of a person without consent, "as part of an advertisement, for the purpose of exploiting the publisher's business, is a violation of the right of privacy of the person whose picture is reproduced," entitling him to recovered damages (122 Ga. at 191). The Court found that publication of a person's picture for purposes of advertising, a clear commercial use, does not protect the publisher by the right of freedom of speech (122 Ga. at 219).

That decision may be factually contrasted with the Court's later opinion in Waters v. Fleetwood, 212 Ga. 161 (1956), where the mother of a 14-year old murder victim was denied recovery for invasion of the mother's privacy when a newspaper published and sold photographs of her partially decomposed daughter's body taken after it was removed from a river. The Georgia Supreme Court expressly concurred in the view that, "where an incident is a matter of public interest, or the subject matter of a public investigation, a publication in connection therewith can be a violation of no one's legal right of privacy." (212 Ga. at 167). The Court further added that with regard to the sale of copies of the photographs which appeared in the newspaper in connection with the news story, "the same rule must apply as would apply to the publication of the photographs in the paper." (212 Ga. at 167).

The Waters factual circumstances are quite analogous to the instant case, and clearly prevent liability herein. As stated therein by the Georgia Supreme Court in approving a prior case denying liability over a radio broadcast concerning plaintiffs' father, "In the case at bar however much we may sympathize with the feelings of the plaintiffs, we consider that the broadcast was the subject of legitimate public interest." 212 Ga. at 165. Noteworthy, these cases declining liability did not involve the use of a person's name or likeness in advertising or for the sale of a product or services.

The leading case on the Georgia right of publicity is Martin Luther King, Jr., Center v. American Heritage Products, 250 Ga. 135 (1982), a decision on certification from the Eleventh Circuit. There, defendant developed and marketed an unauthorized plastic bust of Dr. Martin Luther King, Jr., and advertised same. Plaintiff King Center demanded that defendant cease its activities, and upon its refusal, litigation ensued. The Georgia Supreme Court answered the certified question that a "right of publicity" is recognized in Georgia as distinct from the right of privacy, and afforded posthumous rights thereto. The rationale behind the Court's decision is instructive herein. In the King case, defendant sold a specific product with the likeness of Dr. King, for direct financial profit. Clearly, this was for a commercial purpose. The Court ruled that using the name or photograph of a person for the defendant's own financial gain without consent was a violation of Georgia law and not protected by the freedom of the press. Specifically, the Court declared:

> [W]e hold that the appropriation of another's name and likeness, whether such likeness be a photograph or sculpture, without consent and for the financial gain of the appropriator is a tort in Georgia, whether the person whose name and likeness is used is a private citizen, entertainer, or as here a public figure who is not a public official. (250 Ga. at 703).

In this case, we do not have a commercial appropriation of the name or likeness of the decedent for the financial gain of the Defendant. The publication of an article and photographs of decedent Benoit involved no sale or advertising of a product, nor does Plaintiff so allege. Rather, *Hustler Magazine* published a news story of general public interest concerning the life and death of Nancy Benoit, a conceded public figure (Complaint, ¶ 15). This story was clearly of national interest to *Hustler*'s readers. The story was illustrated by photographs of Nancy Benoit, some of them nude. That is simply not a violation of the decedent's right of publicity, as set forth in the cases above. Moreover, the fact that an image is in a publication, where the publication is offered for sale to the public, does not make it for a "commercial purpose" and therefore subject to the right of publicity.

Almeida v. Amazon.com, Inc., 456 F.3d 1316, 1325 (11th Cir. 2006) [applying Florida law].

In Almeida, the Eleventh Circuit cited with approval the Restatement (Second) of Torts § 652C, comment (d) (1977), to the effect that "the mere incidental use of a person's name or likeness is not actionable under the right of publicity." (456 F.3d at 1526). As relevant, § 652C, comment (d) of the Restatement reads:

> No one has the right to object merely because his name or his appearance is brought before the public, since neither is in any way a private matter and both are open to public observation. It is only when the publicity is given for the purpose of appropriating to the defendant's benefit the commercial or other values associated with the name or the likeness that the right of privacy is invaded. The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness. (Emphasis added)

Thus, it is clear that as a matter of law, the publication of the subject article and photographs of Nancy Benoit were not for a commercial purpose, but of legitimate public interest. Accordingly, they do not fit within the meaning of the Georgia right of publicity.

Moreover, even if the Georgia Supreme Court attempted to allow a cause of action under such circumstances, it would run afoul of the First Amendment's right of freedom of the press, and would be necessarily legally unenforceable. It is settled law that even indecent, non-obscene sexual expression is protected by the

First Amendment. Reno v. American Civil Liberties Union, 521 U.S. 844, 874-75, 117 S.Ct. 2329, 2346 (1997); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836 (1989).

To the extent Plaintiff asserts that the publication of the story and nude photographs of Nancy Benoit were "not necessary or relevant to 'a legitimate news article'" (Complaint, ¶ 20), that is a decision for the editors of *Hustler Magazine* to make, and not the Plaintiff. As set forth by the United States Supreme Court in Harper & Rowe Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 105 S.Ct. 2218 (1985), in quoting Judge Meskill of the Second Circuit: "'[c]ourts should be weary of deciding what is and what is not news' (citation omitted)." (471 U.S. at 561, 105 S.Ct. at 2231).

As aptly summarized by Dean Prosser in his well-known law review article, Prosser, "Privacy," 48 Calif. L. Rev. 383, 412 (1960): "To a very great extent, the press, with its experience or instinct as to what its readers will want, has succeeded in making its own definition of news." Here, the editors of *Hustler Magazine* made their choice to print the subject article and photographs of Benoit, and Defendant LFP published same, as was its right.

CONCLUSION

Defendant LFP's publication of the subject article on the life and death of decedent Benoit in the March 2008 issue of *Hustler Magazine*, including nude photographs of Benoit to illustrate the article, after her murder made national news, was a "newsworthy" publication of substantial public interest. The article was thus outside the scope of the Georgia common law right of publicity as articulated by its courts. Moreover, to the extent that Georgia would contemplate affording Plaintiff an actionable claim herein, it would be precluded by the freedom of the press accorded to LFP under the First Amendment to the United States Constitution.

For the reasons set forth herein, Plaintiff's Complaint fails to state a claim upon which relief may be granted as a matter of law, and it cannot be saved. Defendant LFP's motion to dismiss pursuant to Rule 12(b)(6) should be granted.

This 8th day of April, 2008.

Respectfully submitted,

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RULE 7.1(D) CERTIFICATION

I hereby certify that the foregoing Brief in Support of Defendant LFP Publishing Group, LLC's Motion to Dismiss was prepared in Times New Roman 14 point font in compliance with L.R. 5.1(B).

This 8th day of April, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served the within and foregoing **BRIEF IN SUPPORT OF DEFENDANT LFP PUBLISHING GROUP, LLC'S MOTION TO DISMISS** upon Plaintiff in the above-captioned action by depositing a copy of the same in the United States Mail, with sufficient postage thereon, addressed to except as otherwise noted:

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This 8th day of April, 2008.

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